SITI PUYOH

v.

RASHIDAH SALAM

HIGH COURT SABAH & SARAWAK, SANDAKAN
DOUGLAS CRISTO PRIMUS SIKAYUN JC
[CIVIL APPEAL NO: SDK 12B-2-3-2013]
3 OCTOBER 2013

TORT: *Damages - Liability - Quantum of damages - Bursting of tyre from lorry - Severe eye injury and monocular blindness - Special and general damages - Appeal against - Award for pain and suffering - Whether there was overlap of damages awarded - Whether appellant liable against respondent*

DAMAGES: *Personal injuries - Special Damages - Severe eye injury and monocular blindness - Whether award substantiated by medical reports - Whether error occasioned by trial judge - Whether element of overlapping arose for monocular blindness and pain and suffering*

TORT: *Negligence - Res ipsa loquitur - Application of maxim - Failure to plead - Whether respondent precluded from relying on maxim during trial*

TORT: *Negligence - Duty of care - Failure to exercise care - Whether lorry in roadworthy condition - Whether tyres underwent routine checks - Whether appellant owed duty of care to respondent*

The respondent sued the appellant who was the registered owner of a ten-tonne lorry for special and general damages as a result of losses and injuries sustained in an accident. At the time of the accident, the respondent was selling sugar cane juice by the roadside. The appellant's authorised driver ('DW2') of the said lorry stopped by to buy sugar cane juice from the respondent's stall. Suddenly, the rear tyre of the lorry blew and an explosion propelled a small stone into the respondent's right eye. The respondent was immediately sent to the hospital for treatment but her right eye was seriously injured and became totally blind. The respondent was required to undergo for right eye evisceration. The respondent also testified that she fainted several times due to tremendous pain. At the end of the trial, the Sessions Court

allowed the respondent's claim and awarded a sum of RM80,000 for monocular blindness in the right eye, RM10,000 for pain and suffering and loss of amenities, RM5,000 for lost of marriage prospects, RM2,000 for medical costs and expenses and RM8,000 for costs. Aggrieved, the appellant appealed against the award on the ground that the Sessions Court Judge had erred in law in awarding an additional sum of RM10,000 for pain and suffering and loss of amenities when this head of damages were included in the award for monocular blindness in the right eye. The appellant contended that the lorry driven by DW2 went through periodic inspection at Puspakom and that the tyres of the lorry were free from defects but failed to adduce any evidence to support its contention. The appellant further argued that she owed no duty of care to the respondent to ensure that the lorry was in good condition. To resist the respondent's claim, the appellant also contended that the respondent had not pleaded *res ipsa loquitur* in her pleading and therefore was precluded from relying on the maxim during trial. The issues that arose for determination, *inter alia,* were (i) whether there was an overlap of compensation awarded for pain and suffering and loss of amenities; (ii) whether the appellant had failed to exercise reasonable care in order to ensure the lorry was in a roadworthy condition; (iii) whether the bursting of tyre was an inevitable accident; and (iv) whether the respondent could rely on the maxim *res ipsa loquitur* although not pleaded in pleadings.

Held (dismissing appeal with costs):

(1) The Sessions Court Judge had directed her mind to the medical reports, pain and suffering suffered by the respondent before and after the operation in awarding the damages of RM10,000. Therefore, there was no overlapping of compensation by awarding the additional sum of RM10,000 for pain and suffering and loss of amenities on top of the RM80,000 as award for injury of monocular blindness in the right eye. (paras 10 & 11)

(2) In the absence of a written report from Puspakom, the appellant had failed to exercise reasonable care and skill to maintain or inspect the said lorry in order to ensure that the lorry was in good condition while on the road. Without proper maintenance of the lorry, specially the tyres, there was a

possibility of a tyre burst to occur considering the large size of the lorry and the long journey driven. As such, the bursting of the tyre was not an inevitable accident but was solely caused by the appellant's negligence for failure to exercise care or skill which a reasonable man should take in the management, control and maintenance of the lorry. (paras 14, 15, 16 & 18)

(3) The principle of *res ipsa loquitur* was essentially a rule of evidence regarding onus of proof. *Res res ipsa loquitur* merely shifts the burden of introducing evidence to explain how the impugned incident occurred without negligence. It was also trite that pleading required only a disclosure of material facts and not evidence (*Professor Dr Hj Mohamed Feizal & Anor v. Harvender Jeet Kaur Kaka Singh & Anor;* refd). Therefore, even if the respondent had failed to plead the maxim of *res ipsa loquitur* in her pleadings, it did not preclude the respondent from relying on the maxim and raising the same at the end of trial. (para 21)

(4) Since the tyre of the lorry was under the sole control and management of the appellant and DW2, the presumption was that the tyre burst was caused by negligence on the part of the defendant as the tyre burst *per se* was a neutral event consistent with negligence on the part of the appellant. The appellant had not provided any credible evidence to show that all reasonable care about the management of the tyre or that the tyre burst could not have been avoided by the exercise of care and skill. As such, it was clear that the respondent had made out a *prima facie* case of negligence against the appellant. Therefore, the Sessions Court judge was correct in her finding that the appellant was 100% liable against the respondent. (paras 23, 24 & 25)

Case(s) referred to:

David Chelliah v. Monorail Malaysia Technology Sdn Bhd & Ors [2009] 3 CLJ 771 HC ***(refd)***

Gnanasambanthan Neelameham Pillay v. Simon Jerome Vendargon & Ors [2011] 1 LNS 1412 HC ***(refd)***

Professor Dr Hj Mohammed Feizal Abdullah & Anor v. Harvender Jeet Kaur Kaka Singh & Anor [2010] 4 CLJ 378 HC ***(refd)***

Zainun Abdul Ghani & Anor v. Chong Ah Seng & Anor [1974] 1 LNS 197 HC ***(refd)***

A *For the appellant - Colin Clark; M/s Clark, KS Chin & Co*
For the respondent - Voo Sin Men; M/s Voo & Co

Reported by Sandra Gabriel

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JUDGMENT

Douglas Cristo Primus Sikayun JC:

[1] This is an appeal against the decision of the learned Sessions
C Court Judge ("SCJ") given on 12 May 2013 in allowing the claim of the respondent against the appellant.

[2] In this action for negligence, the respondent is suing the appellant who is the registered owner of a white colour ten-tonne
D lorry bearing registration No. SS3117E ("the said lorry") for special and general damages as a result of losses and injuries sustained in an accident happened on 25 April 2011 on or about 3pm at Simpang Gedau, Mile 40 Jalan Telupid, Sabah. At that time, the respondent and her brother, Azuan bin Salam were selling sugar
E cane juice by the road side. The appellant's authorised driver of the said lorry stopped by and wanted to buy sugar cane juice from the respondent's stall. Suddenly the rear tyre of the said lorry blew and an explosion propelled a small stone into the respondent's right eye. The respondent was immediately sent to
F Hospital Duchess of Kent Sandakan for emergency treatment but her right eye was seriously injured and she became totally blind.

[3] At the end of the trial, the learned SCJ allowed the respondent's claim and awarded as follows:

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(a) Monocular blindness in the right eye	RM80,000
(b) Pain and suffering and loss of amenities	RM10,000
(c) Lost of Marriage prospects	RM5,000
H (d) Medical costs and expenses	RM2,000
(e) Costs	RM8,000

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[4] Aggrieved with the above decision the appellant petition that:

Ground 1: The learned trial judge erred in law in awarding an additional sum of RM10,000 to the plaintiff for pain and suffering and loss and amenities when this head of damages are included in item (a) of Judgement After Trial dated 12 March 2013 (monocular blindness of the right eye);

Ground 2: The learned trial judge erred in law in failing to find not finding that the bursting of the tyre was not caused by a patent defect which could be discovered by visual inspection;

Ground 3: The learned trial judge erred in law in not finding that the defendant did not owe a duty of care to the plaintiff;

Ground 4: The learned trial judge erred in law in not finding that the maxim of *Res Ipsa Loquitur* did not apply in the circumstances of the case;

Ground 5: The finding of the learned trial judge is against the weight of evidence.

Grounds 1: Whether The Learned Trial Judge Erred In Law In Awarding An Additional Sum Of RM10,000 To The Plaintiff For Pain And Suffering And Loss And Amenities When This Head Of Damages Are Included In Item (a) Of Judgement After Trial Dated 12 March 2013 (Monocular Blindness Of The Right Eye)

[5] In awarding RM10,000 for pain and suffering and loss and amenities to the respondent the learned SCJ held that:

> For pain and suffering and loss of amenities, I allowed RM10,000.00 taking into consideration the pain she suffered and trauma undergoing the operation and post operation. (see page 35 of SROA)

[6] The appellant however contended that the award of RM10,000 for pain and suffering should be inclusive of the sum of RM80,000 award for the injury of monocular blindness of the right eye of the respondent. The appellant however did not give

A any reason or adduce any supporting authorities to support her contention that the award for pain and suffering should not separated from the award for the injury. It should be noted that the award of RM10,000 is not merely for pain and suffering but also for loss of amenities.

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[7] In the case of *Gnanasambanthan Neelameham Pillay v. Simon Jerome Vendargon & Ors* [2011] 1 LNS 1412, Vernon Ong JC held that:

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> The award for pain and suffering is often treated together with the loss of amenities.
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> ... *Pain and suffering covers the physical pain of the injury and includes past and prospective pain including pain from medical treatment.* It encompasses the medical treatment, the length of hospital stay, the
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> D number of operations, the loss or partial loss of use of the affected parts of the body after the incident, the element of depression and the reduction of the expectation of life. Loss of amenities includes loss of body faculties, deprivation of ordinary experiences, sexual impotence and loss of marriage prospects (objective elements); personal sense of loss (subjective element).
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> ... The deceased unconsciousness cannot negate the pain suffered by the deceased. He suffered seizures, scrotal abscess, pneumonia, lung infection, bed sores, sepsis, cerebella atrophy, contractures of both legs, loss of muscle mass, hypoxic ischemic encephalopathy, breathing discomfort and many other complications; in addition he
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> F also had to undergo painful invasive procedures. The deceased had to be kept and monitored in the CICU and HDU (both are critical care units) throughout the admission period. *This is an instance in which a substantial award for pain and suffering and loss of amenities is appropriate. In all the circumstances of the case the Court*
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> G *considers RM150,000.00 for pain and suffering and loss of amenities to be a fair and reasonable estimate of the amount to which the plaintiff is entitled* (*Jennifer Anne Harper, supra; Bujang bin Mat, supra*; *Wong Li Fatt, supra*). (emphasis added)

[8] It has been established during the trial that after the said
H incident the respondent was immediately sent to HDOK Sandakan for operation. This is evident from the medical report prepared by Dr. Omar Hefni Abdul Wahab Ali Salama (PW3) where it was stated that the respondent was required to undergo for right eye evisceration under G.A on 25 April 2011 and further review in the
I said hospital on 5 May 2011, 23 September 2011 and 22 November 2011 respectively. (See pp. 39-41 of the record of appeal).

[9] The respondent in her witness statement (PW1-WS) testified that she was really in pain when a piece of stone hit into her right eye. She was conscious for few minutes after she has reached at HDOK and she was seriously in pain while the doctor and nurse were cleaning her right eye before she fainted again due to the tremendous pain. After she was awake from the operation and was discharge thereafter she was still in pain. The relevant evidence of the respondent is reproduced as follows:

> d. At that material time I can feel that stones on the road that scattered due to the massive burst of the tyre of the said lorry hit my face and at the same time I can feel a piece of stone hit strongly and precisely into my right eye. I was really in pain and I can feel my right eyes bleeding and I immediately collapse and fall unconscious.
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> g. After reached Hospital Duchess of Kent, Sandakan, Sabah, I was immediately referred to Emergency Department. I was conscious for few minutes and I still remember that I am seriously in pain at that material time. I can feel my right eye is bleeding and I cannot see anything through it. As I remember he doctor and nurse are cleaning my right eyes before I fainted again due to the tremendous pain.
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> j. After I'm awake from the operation I can still feel the pain and I feel hopeless in life as my right eye is now totally pain. I was really suffered that I have to go through the pain and I also need to re-arrange my life-style without my right eye which is not easy thing to do.

[10] My perusal of the grounds of judgment reveals that the learned SCJ has directed her mind to the whole circumstances of the case especially the pain suffered by the respondent before and after the operation. In so awarding the damages of RM10,000 for pain and suffering, the learned SCJ has also taken into consideration the medical reports of the respondent.

[11] Premised on the above facts and authority, it is my view that there is no overlapping of compensation by awarding the additional sum of RM10,000 for pain and suffering and loss of amenities on top of the RM80,000 as award for injury of monocular blindness in the right eye of the respondent. As such I shall not disturb the quantum of the damages for pain and suffering and loss of amenities awarded by the learned SCJ.

Grounds 2 - 5:

– *Busting Of The Tyre Was Not Caused By A Patent Defect Which Could Be Discovered By Visual Inspection*

– *No Duty Of Care*

– *Maxim Res Ipsa Loquitor Did Not Apply In This Case*

– *Finding Against The Weight Of Evidence*

[12] The appellant's grounds of appeal 2-5 above concerned on the finding of 100% liability against the appellant by the learned SCJ. As such, I will deal with these grounds together.

[13] Learned counsel for the appellant submitted that the defendant through DW1 and DW3 has led evidence that they have taken steps to fulfil their duty by doing the following:

(a) The lorry driven by DW2 on the day of the accident goes through periodic inspection at Puspakom;

(b) Puspakom checks the lorry to see if it is roadworthy and will fail vehicles that are unroadworthy or a danger to road users;

(c) The appellant, before the lorry leaves the appellant's property, would check the tyres externally to see if there was any defect.

(d) Appellant only uses new tyres to replace old tyres. She does no use rethread tyres

[14] As rightly decided by the learned SCJ, there was no written evidence or Puspakom report adduced by DW1 and DW2 to support their testimonies that the said lorry was sent to Puspakom for inspection. In fact, DW1 and DW2 had testified that they only made general inspection ("mata kasar") of the said lorry which in my view was not enough to determine whether the tyre or the air pressure of the tyre is safe.

[15] As such, I have to agree with the learned SCJ that the appellant had failed to exercise reasonable care and skill to maintain and/or control and/or manage and/or inspect and/or service of the said lorry in order to ensure the said lorry in a good condition while on the road.

[16] Next, the appellant contended that he has no duty of care to the respondent. However being the owner of the said lorry the respondent and her authorised driver owe a duty of care to the respondent to ensure the said lorry in a good condition. It has been established during the trial that the authorised driver was driving on a long journey ie, from mile 60 to Sandakan and with the carriage of oil palm fruits. As such, without proper maintenance of the said lorry especially its tyres the possibility of tyre to burst could occur having considered the size of the said lorry which is very large.

[17] The learned SCJ was right in citing the case of *Zainun Binti Abdul Ghani & Anor v. Chong Ah Seng & Anor* [1974] 1 LNS 197; [1975] 1 MLJ 33 whereby the court held that:

> ... there is no inevitable accident unless the defendant can prove that something happened over which he had no control and the effect of which could not have been avoided by the exercise of care and skill.

[18] As such the bursting of the tyre was not an inevitable accident but was solely caused by the appellant's negligence for failure to exercise care or skill which a reasonable man should take in the management and/or control and maintenance of the said lorry.

[19] To resist the respondent's claim the appellant also contended that the respondent has not pleaded *res ipsa loquitur*.

[20] On this issue, reference is made to the *Professor Dr Hj Mohammed Feizal Abdullah & Anor v. Harvender Jeet Kaur Kaka Singh & Anor* [2010] 4 CLJ 378; [2009] 1 LNS 952, where Harmidah Singh Dhaliwal held as follows:

> Now, two questions arise as to whether the maxim can be relied upon in the instant case. The first question is whether the maxim *res ipsa loquitur* must be pleaded and the second, whether the baby was under the exclusive care of the plaintiffs.
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> With regards to the first question, it should be observed that the principle of *res ipsa loquitur* is essentially a rule of evidence regarding onus of proof. In any trial, although the burden of proof remains throughout on the plaintiff, it is not uncommon for the burden of introducing evidence, or sometimes referred to as the onus of proof, to shift from one side to the other depending

A upon the evidence that is introduced (ss. 101, 102, and 103 Evidence Act 1950). In a similar way, a case of *res ipsa loquitur* merely shifts the burden of introducing evidence to explain how the impugned incident occurred without negligence on the part of the party upon whom negligence is alleged. Furthermore, it is also trite that pleadings require only a disclosure of material facts not evidence. For these reasons, I am more inclined to hold that a failure to plead the maxim in this case does not preclude the 1st defendant from raising the same at the end of the trial (see also *Bennet v. Chemical Construction (GB) Ltd* [1971] 1 WLR 1571 and *Teoh Guat Looi v. Ng Hong Guan* [1998] 4 CLJ 416; [1998] 4 AMR 3815).

[21] Premised on the above authority, even if the respondent had failed to plead the maxim of *res ipsa loquitur* in her pleadings it does not preclude the respondent from relying on this maxim and raising the same at the end of trial.

[22] On the principle of *res ipsa loquitor*, I would also refer to the case of *David Chelliah v. Monorail Malaysia Technology Sdn Bhd & Ors* [2009] 3 CLJ 771, where the plaintiff is this case was hit by a safety wheel failing from a KL monorail train on a rest run and suffered serious head and bodily injuries a result. Harmindar Singh Dhaliwal JC held that:

> [19] In any action for negligence, the burden is on the plaintiff to prove certain specific acts or omissions on the part of the defendant to show some negligent conduct. Sometimes a *prima facie* inference of negligence may be drawn from the circumstances of the case by recourse to the maxim known as *res ipsa loquitur*. Loosely translated, this colourful Latin phrase means "the event speaks for itself". It is essentially a rule of evidence premised on common sense, fair play and justice.
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> [20] This rule probably emanates from the case of *Scott v. London and St Katherine Docks Co* [1865] 3 H & C 596 where the plaintiff, a customs officer, was injured by some sugar bags falling on him in the defendant's warehouse. The principle was enunciated by Erle CJ as follows (at p. 667):
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> > There must be some reasonable evidence of negligence. But *where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care.*

[23] The rationale for this rule was explained by the Federal Court in *MA Clyde v. Wong Ah Mei* [1970] 1 LNS 73 as follows (at p. 188):

> The fundamental basis of the maxim is that the rule that it is for the plaintiff to prove negligence and not for the defendant to disprove it, may cause hardship to the plaintiff if it is impossible for him to know what precise acts of omission led to this damage, and this is most obviously so where the cause of the damage is peculiarly within the means of knowledge of the defendant who caused it.

[24] Applying the principles to the present case, *it would be safe to assert that a safety wheel of a Monorail train does not, in the ordinary course of things, fall off and hit persons on the ground below. It will also be fair to say that the safety wheel on the train was under the sole control of the 1st and 2nd defendants or their servants*. For this reason, the defendants' reliance on the *American case of Beulah Larson v. St Francis Hotel* 83 Cal. App 2d 210 is, with respect, misplaced. In that case, the plaintiff had failed to prove that the defendant had exclusive control of the falling armchair outside the defendant hotel. Finally, in the present case, *although the plaintiff could point to the safety wheel coming off the Monorail train, he is unable to state precisely why the wheel had come off. It was therefore clear to me that the plaintiff had made out a prima facie case of negligence on the part of the 1st and 2nd defendants. It was therefore incumbent on the part of the 1st and 2nd defendants to provide credible evidence to show that the incident occurred without negligence*.
(emphasis added)

[23] Applying the above case to the case at hand, since the tyre of the said lorry was under the sole control and management of the appellant and/or her authorised driver the presumption is that the tyre burst of the said lorry is caused by negligence on the part of the defendant since the tyre burst *per se* is a neutral event consistent and equally consistent with negligence or due diligence on the part of the appellant. Therefore, it was incumbent upon the appellant to provide credible evidence to show that the said incident occurred without negligence.

[24] As ruled earlier, the respondent had not provided any material or documentary and credible evidence to show that she and/or her authorised driver have used all reasonable care in or about the management of the tyre of the said lorry or that the

A tyre burst could not have been avoided by the exercise of care and skill. As such, it is clear that the respondent had made out a *prima facie* case of negligence on the part of the appellant.

[25] On the final analysis, I am of the view that based on the
B evidence adduced in court and the circumstances of this case, the learned SCJ was correct in her finding that the defendant was 100% liable against the respondent.

Conclusion

C **[26]** Based on the foregoing, I hereby dismiss this appeal with costs of RM5,000 payable by the appellant to the respondent.

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